

HAZEL KING

IBLA 86-1616

Decided March 20, 1987

Appeal from a decision of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, not to take enforcement action in response to a citizen's complaint. Ten-Day Notice X-85-81-016-01 TV1.

Motion to dismiss denied; decision vacated; immediate re-inspection ordered.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections: Generally -- Surface Mining Control and Reclamation Act of 1977: Permanent Regulatory Program: Generally

Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally -- Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State -- Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

If, upon reinspection after a state has failed to take appropriate action in response to a 10-day notice or

to show good cause for such failure, OSM determines there is a violation of the Act, the state program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

APPEARANCES: Thomas J. FitzGerald, Esq., Frankfort, Kentucky, and L. Thomas Galloway, Esq., Washington, D.C., for appellant; Anne C. Sanders, Esq., Division of Surface Mining, Office of the solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

I. Factual and Procedural Background

On January 3, 1985, the London (Kentucky) Area Office of the Office of Surface Mining Reclamation and Enforcement (OSM) received a citizen's complaint from Hazel King. It inspected on January 9, 1985, and found evidence of subsidence occurring on the permanent program portion of the permit issued to Harlan-Cumberland Coal Company for an underground mining operation

in Harlan County, Kentucky. 1/ "The subsidence cracks were fairly large (3 X 5 feet wide) and deep (40 feet) * * *. There is a possibility of someone or something falling into these cracks at several points along the breakline," the inspector wrote in his report.

On January 10, 1985, the London Area Office issued a 10-day notice (No. 85-81-061-01) to the regional office of the Kentucky Department for Surface Mining Reclamation and Enforcement (DSMRE) citing a violation of 405 Kentucky Administrative Regulation (KAR) 18.210. 2/ The London Area Office granted Kentucky two extensions of time in which to respond. On February 14, 1985, Kentucky responded that, because there are at least two other seams that have been mined that overlie the seam being mined, "DSMRE cannot make a determination that Harlan Cumberland caused the subsidence." "DSMRE is not going to take enforcement action at this time," it said, but would "continue to gather information." "If such information

1/ The operator's state permit number is 648-5052.

2/ The notice stated:

"You are notified that as a result of a citizen complaint (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken."

See 30 CFR 842.11(b).

405 KAR 18.210, Subsidence control, provides in part:

"1. General requirements. (1) Underground mining activities shall be planned and conducted so as to prevent subsidence from causing material damage to the surface, to the extent technologically and economically feasible, and so as to maintain the value and reasonably foreseeable use of surface lands."

indicates that the Harlan Cumberland [sic] is truly responsible for the subsidence, DSMRE will take appropriate action," the response concluded.

On February 19, 1985, the London Area Office asked the OSM Lexington Field Office to request the OSM Eastern Technical Center (ETC) (in Pittsburgh) to send a specified person familiar with a previous subsidence problem in the area to "join with us in making another field [inspection] and permit analysis for the purposes of determining Federal enforcement potential." 3/ Initially, ETC declined the Lexington Field Office's request for technical assistance, saying a review of the documents forwarded with the request "reveals that the State's response is inadequate," but on May 23, 1985, the ETC forwarded to the Lexington Field Office a detailed report by its geologist and an evaluation by the Solicitor's Office of responsibility for the subsidence. 4/

3/ The London Area Office's request concluded: "Please make the request immediately as OSM's inspector reports subsidence cracking (in a populated area) large enough for a person to easily fall into."

4/ The geologist's report stated that the investigation was undertaken to determine "if a large crack reported on the upper part of the slope above the Harlan Cumberland coal mine near Closplint, Kentucky is mine related." It concludes:

"Conclusions

"1. The crack system identified and observed on the hillside is related to subsidence in the Harlan Cumberland mine for the following reasons:

* * * * *

"d. The fractures are approximately over the barrier rib between the East Over Mine and the Harlan Cumberland Mine (see discussion below).

* * * * *

"Explanation of Expression of the Failure

* * * * *

"The MSHA inspector (verbal communication [sic]) said that the East Over Mine was closed down for a long period of time in 1982 due to a strike. When the mine was reopened it was discovered that a large area of the mine just south of the barrier had collapsed (Map 2). This failure would apply a heavy strain to the overburden, especially to the north where no mining had taken place.

On June 5, 1985, the Director of the OSM Lexington Field Office wrote the Commissioner of the Kentucky Department stating that, based on the ETC report, it had found that the large cracks were caused by Harlan-Cumberland Coal Company's current underground operation and requesting that Kentucky "review the situation again and advise us by June 14, 1985, of your position." The Commissioner initially responded that a report by that date was "probably unrealistic [sic]." On August 7 he responded, concluding that the Department "does not believe there is sufficient evidence to charge Harlan Cumberland with a violation of the regulations and no enforcement action will be taken at this time." The Commissioner also observed that there was no evidence to indicate the subsidence had caused "material damage to renewable resource lands."

The Commissioner's observation led the Director of the OSM Lexington Field Office on August 22, 1985, to request prompt clarification from the

fn. 4 (continued)

"When the retreat mining took place in the Harlan Cumberland mine, a strain would have been transmitted to the overburden to the south of the retreat area as the pillar retreat is to the north. The combined stress of the two opposing strain systems breaking the overburden is the most likely explanation of the magnitude of the fracture system. The crack would have developed just from the retreat mining that is taking place, but it would probably have been smaller and less damaging to the surface."

The report notes as an "Additional Comment": "The Mine Permit Map (Map 1) shows the mining to stop just short of the houses in the bottom of the valley adjacent to the King property * * *."

The mine permit map is not included in the record.

By order dated Oct. 9, 1986, the Board directed OSM to provide a copy of the Solicitor's evaluation of responsibility for the subsidence as one of several items needed to complete the administrative record. OSM's response, filed Oct. 29, 1986, did not include the document, invoking "the attorney-client privilege [sic]." We assume that OSM had previously provided the document to the Kentucky DSMRE, since it is relied on in the Aug. 7, 1985, letter of the Commissioner of the DSMRE to the Director of OSM's Kentucky Field Office. It is therefore a public record of the Department and a matter of which the Board may take official notice. 43 CFR 4.24(b). Invocation of the attorney-client privilege in these circumstances is inappropriate.

Acting Chief of OSM's Division of Regulation and Inspection in Washington "with respect to the operator's obligation to prevent subsidence not causing material damage to a renewable resource or affecting structures. * * * We * * * need clarification of the types of damage OSM considers as a violation." 5/ Apparently there was no response to this request because on January 10, 1986, the London Area Office wrote the Lexington Field Office saying the 10-day notice to Kentucky was still unresolved and suggesting a follow-up request to Washington.

Washington's response eventually came in a March 13, 1986, memorandum from the Director of OSM. 6/ Based on the policy guidance it contained, the Director of the Kentucky Field Office wrote the Commissioner of the Kentucky

5/ "The Federal Regulations of 30 CFR 784.20 appear to require the operator to consider only renewable resources and structures in the permit preparation while 30 CFR 817.121 appears to be more broad in protecting the 'value and reasonably foreseeable use of surface lands.' The Kentucky regulations of 405 KAR 18:210 and 8:040 Section 26 are similar to OSM's and contain the same conflict," the Aug. 22, 1985, memorandum stated.

6/ The Mar. 13 Director's memorandum stated that "subsidence-caused material damage to all surface lands, whether or not they involve renewable resources, must be corrected to the extent technologically and economically feasible, pursuant to 30 CFR 817.121(c)." In view of the specific situation that prompted the original Aug. 22 request, the memorandum addressed "three other relevant issues":

"First, OSMRE has not defined 'material damage' and it is up to the State regulatory authority in primacy states to determine whether a given incident of subsidence damage constitutes material damage. This deference to the regulatory authority is found in the preamble to the 1979 rules (44 FR 15075), and has not been modified through subsequent rulemakings.

"Second, the mere occurrence of material damage due to subsidence does not constitute a violation. A violation subject to enforcement procedures occurs only when there is failure to correct the damage pursuant to 817.121(c) or failure to obey any order issued under the authority of section 817.121.

"Third, the subsidence must be attributable to underground extraction occurring after eight months from the date of primacy in order to be subject to the performance standards of 817.121."

DSMRE on April 3, 1986, stating that 405 KAR 18:210 "applies to material damage to all surface lands whether or not they involve renewable resources," and citing several other regulations as potentially applicable to reclamation of subsidence damage. "Material damage," insofar as performance standards were concerned, should be defined to include "a safety hazard now or in the future" and "if the economic value of the land has been adversely affected," the letter advised, but "[i]ssuance of a violation may not be necessary to resolve subsidence impacts if you wish to work with the operator under the provisions of contemporaneous reclamation associated with backfilling and grading." The April 3 letter concluded by modifying the January 10, 1985, 10-day notice to include these other regulations and requesting Kentucky DSMRE to "advise us by April 18 of State action taken."

The Commissioner of the Kentucky DSMRE responded on May 23, 1986. "We are also concerned with the effects of subsidence when it causes a safety hazard or material damage," the Commissioner wrote, but

the more difficult task is determining whether the underground mining operation caused the hazard or material damage. Since your Eastern Technical Center has just completed review of the Harlan Cumberland site on May 19, 1986, we would like the results of their investigation to assist us in determining the proper course of action in this matter. Upon receipt of that information from your office, we will re-open our investigation of the alleged subsidence at Harlan-Cumberland. 7/

7/ This report, listed as item No. 5 in ISM's Oct. 29, 1986, response to the Board (see note 4, supra) but labeled No. 6, is a "Report of Investigation of Subsidence Complaints Near the Harlan-Cumberland Coal Company Permit Number 648-5052" involving "seven residences that have incurred various degrees of structural damage in Black Bottom and Closplint, Harlan County, Kentucky (Figure 1). Other investigations have been conducted in this immediate area

On May 28, 1986, counsel for Hazel King wrote the Director of the OSM Lexington Field Office

to respectfully demand that the Office of Surface Mining comply with the * * * mandatory duty under 30 CFR 843.12(a)(2) to take appropriate inspection and enforcement action against a violation of the federal Act and regulations when the state has failed, within ten days of receipt of a "Ten Day Notice," to take action reasonably calculated to abate the violation. It has been over sixteen months since the Commonwealth of Kentucky received the ten-day notice regarding this operation. [Emphasis in original.]

"Unless appropriate action pursuant to 30 CFR 817.121 is forthcoming within twenty (20) days, we will appeal this failure to take appropriate action to the Interior Board of Land Appeals," the letter concludes.

On June 4, 1986, the OSM Lexington Field Office wrote the Commissioner of the Kentucky Department concerning

the original ten-day notice, #85-81-061-01, which has been demonstrated to have resulted from subsidence. I am requesting that you reevaluate your previous responses regarding this complaint * * * in light of the options outlined in my letter of April 3, 1986. Further, I request that your review and response be forwarded no later than June 13, 1986, in order to expedite the resolution of these long-standing ten-day notices.

fn. 7 (continued)

and are detailed in memoranda to W. H. Tipton dated Dec. 2, 1983, Oct. 22, 1984, Mar. 28, 1985 and May 23, 1985."

Figure 1 is not included in the record so the relationship of the crack discussed in the May 23, 1985, report (see note 4, supra) and the residences discussed in this report cannot be determined.

The report states that as of May 16, 1986, "[T]he complaint area has not been undermined," and that "all of the complainants' residences are more than 200 feet outside the calculated extent of potential surface disturbance."

The report concluded: "No evidence was found to link the structural damage to buildings in the complaint area to mine subsidence."

The OSM Lexington Field Office responded to appellant's counsel on July 1, 1986, that Kentucky "has advised us that they are going to reinvestigate the allegation of subsidence at the Harlan Cumberland mine permit number 648-5052 * * *. [8/] Although we realize there has been a long delay, we are going to allow them to complete this investigation prior to deciding on Federal action." Counsel for Hazel King replied on July 2, 1986, that this response was "entirely inadequate" and stated "we will appeal forthwith to the Interior Board of Land Appeals unless you provide a time certain for the state response, not to exceed ten (10) days, consistent with 30 CFR 843.12(a)(2) after which your agency will take direct inspection and enforcement action."

Stating that no inspection or enforcement action had taken place by August 18, 1986, and no response to the January 3, 1985, complaint had been received, counsel for Hazel King filed this appeal seeking

an Order directing the Office of Surface Mining Reclamation and Enforcement, Kentucky Field Office to conduct a federal inspection and take appropriate enforcement action pursuant to 30 CFR 842.11(b)(1), 842.12 and 843.12(a)(2) or to provide Appellant, as required by 30 CFR 842.12(d) a written explanation for failure to take inspection and/or enforcement action. Jurisdiction for this appeal is grounded upon 43 CFR 4.1280 et seq. and 30 CFR 842.15(d).

On September 10, 1986, the Commissioner of the Kentucky DSMRE wrote the Director of the Kentucky Field Office:

8/ The Board requested a copy of the Kentucky response referred to in the July 1 letter in its Oct. 9, 1986, order. See note 4, supra. Although OSM's response filed Oct. 29, 1976, lists the response as item No. 6, no copy of it was included in the documents submitted to the Board.

You will recall that the OSMRE Report by the Eastern Technical Center [dated May 23, 1985; see note 4, supra] failed to establish that Harlan-Cumberland's operation caused the subsidence. The more recent OSM Report [dated May 19, 1986; see note 7, supra] also fails to make a connection between subsidence and Harlan-Cumberland's current operations. Recently, the company has advised that any hazard related to the subsidence has been eliminated by filling the surface cracks. Our inspectors have also advised that a "No Trespassing" sign has been posted and fencing has been installed.

In view of the above, and especially the OSM reports, we do not feel that Harlan-Cumberland's current operations require enforcement action for causing material damage to renewable resource lands.

On October 29, 1986, OSM filed a copy of the following memorandum from the Chief of the Technical Assistance Division, Eastern Field Operations, OSM, to the Director of the Kentucky Field Office, dated October 22, 1986:

In response to your October 15, 1986 request for Technical Assistance, an investigation of the cause and severity of mine subsidence on and adjacent to the Harlan-Cumberland Coal Company, Permit No. 648-5052 was conducted by this office. The attached interim report discusses the analysis and recommendations. A final report, including maps showing the location of the subsidence cracks relative to the mine workings, and discussion of potential abatement measures will follow shortly.

In summary, pillar pulling during the retreat phase of mining in the Harlan-Cumberland Coal Company H-2 Mine has created an extensive system of subsidence cracks on the hillside south of Black Bottom and west of Closplint, Kentucky. The extremely large size of these cracks and their proximity to a hillside trail render them an extreme danger to the health and safety of the general public.

The attached interim report concluded:

The ETC recommends the following steps be taken:

- * Conducting a survey to more accurately map the location and orientation of the crack systems;

* Immediately contacting all affected surface owners and advising them of the dangerous conditions on their property;

* Clearly posting, fencing, barricading and otherwise marking all open cracks in order to restrict access by pedestrians and vehicles;

* Immediate preparation of a reclamation plan to abate the hazard by filling the cracks and restoring the hillside to a safe condition. A method of delivering durable fill material should be selected which would minimize impacts to the existing terrain and vegetation. Upon approval by the state regulatory authority, the plan should be implemented immediately.

No more recent information has been provided for the record.

II. The Governing Regulations

Since it was originally adopted in 1979, 30 CFR 842.12 has provided what "an authorized representative of the Secretary" and "the Office" must do in response to a citizen's request for a Federal inspection. ^{9/} 30 CFR 842.15 originally provided that informal review of decisions under 842.12 was to be conducted by the "Regional Director." ^{10/} When revisions of these regulations were proposed in December 1981, the preamble noted that all references to "Regional Director" in the then-existing rules were replaced with references to "Director," "to conform to the September 13, 1981, reorganization of OSM, which abolished the Office's previous regional structure." ^{11/}

^{9/} 44 FR 15457 (Mar. 13, 1979); 47 FR 35636 (Aug. 16, 1982).

^{10/} 44 FR 15458 (Mar. 13, 1979). In 30 CFR 700.5, "Office" was defined to mean the "Office of Surface Mining Reclamation and Enforcement," "Regional Director" as "a Regional Director of the Office or a Regional Director's representative" and "Director" as the Director of the Office "or the Director's representative." 44 FR 15314 (Mar. 13, 1979).

^{11/} 46 FR 58464 (Dec. 1, 1981).

In 30 CFR 842.15 "Regional Director" was in fact replaced with "Director or his or her designee." 12/

The preamble to the proposed revisions also noted the addition of 30 CFR 842.15(d) providing that "[a]ny determination made under paragraph (b) [of 30 CFR 842.15] shall contain a right of appeal to the Office of Hearings and Appeals" 13/ and described such a determination as "a 'Decision of OSM' within the scope of 43 CFR 4.1281." 14/ This description was included in the rule itself as finally adopted. 15/ The background of this revision was explained in Donald St. Clair, 77 IBLA 283, 294, 90 I.D. 496, 501-02 (1983):

In a settlement agreement in March 1980, concluding the dispute in a District of Columbia District Court case, Council of the Southern Mountains, Inc. v. Andrus, CA No. 79-1521, OSM agreed to allow the right of appeal from Director's decisions in citizens' complaint proceedings in accordance with a memorandum issued by the OSM Director to all Regional Directors on February 4, 1980. That memorandum instituted the policy of including the right of appeal language in each informal review decision based on a citizens' complaint. 8/

8/ We are not unmindful that the memorandum referred only to 30 CFR 721.13, the interim program counterpart to 30 CFR 84.215. It is possible, however, to read the memorandum more broadly, given its multiple usage of "citizen complaint" without tying those words specifically to section 721.13. Whatever the proper view of that possibility, the regulatory amendment and the February 1980 memorandum and subsequent court action make manifest the Secretary's intent that all decisions on citizens' complaints be reviewable whether or not they contain the right to appeal and whether the complaint preceding them arose under Part 721 or Part 842.

12/ 46 FR 58472 (Dec. 1, 1981); 47 FR 35636 (Aug. 16, 1982).

13/ 46 FR 58472 (Dec. 1, 1981).

14/ 46 FR 58467 (Dec. 1, 1981).

15/ 47 FR 35629, 35636 (Aug. 16, 1982).

Thus, the governing regulations currently provide:

§ 842.12 Requests for Federal inspections.

(a) A person may request a Federal inspection under § 842.11(b) by furnishing to an authorized representative of the Secretary a signed, written statement (or an oral report followed by a signed, written statement) giving the authorized representative reason to believe that a violation, condition or practice referred to in § 842.11(b)(1)(i) exists and that the State regulatory authority, if any, has been notified, in writing, of the existence of the violation, condition or practice. The statement shall set forth a phone number and address where the person can be contacted.

(b) The identity of any person supplying information to the Office relating to a possible violation or imminent danger or harm shall remain confidential with the Office, if requested by that person, unless that person elects to accompany the inspector on the inspection, or unless disclosure is required under the Freedom of Information Act (5 U.S.C. 552) or other Federal law.

(c) If a Federal inspection is conducted as a result of information provided to the Office by a person as described in paragraph (a) of this section, the person shall be notified as far in advance as practicable when the inspection is to occur and shall be allowed to accompany the authorized representative of the Secretary during the inspection. Such person has a right of entry to, upon and through the coal exploration or surface coal mining and reclamation operation about which he or she supplied information, but only if he or she is in the presence of and is under the control, direction and supervision of the authorized representative while on the mine property. Such right of entry does not include a right to enter buildings without consent of the person in control of the building or without a search warrant.

(d) Within ten days of the Federal inspection, or, if there is no Federal inspection, within 15 days of receipt of the person's written statement, the Office shall send the person the following.

(1) If a Federal inspection was made, a description of the enforcement action taken, which may consist of copies of the Federal inspection report and all notices of violation and cessation orders issued as a result of the inspection, or an explanation of why no enforcement action was taken;

(2) If no Federal inspection was conducted, an explanation of the reason why; and

(3) An explanation of the person's right, if any, to informal review of the action or inaction of the Office under § 842.15.

(e) The Office shall give copies of all materials in paragraphs (d)(1) and (d)(2) of this section within the time limits specified in those paragraphs to the person alleged to be in violation, except that the name of the person supplying information shall be removed unless disclosure of his or her identity is permitted under paragraph (b) of this section.

* * * * *

§ 842.15 Review of decision not to inspect or enforce.

(a) Any person who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation may ask the Director or his or her designee to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for Federal inspection under § 842.12. The request for review shall be in writing and include a statement of how the person is or may be adversely affected and why the decision merits review.

(b) The Director or his or her designee shall conduct the review and inform the person, in writing, of the results of the review within 30 days of his or her receipt of the request. The person alleged to be in violation shall also be given a copy of the results of the review, except that the name of the person who is or may be adversely affected shall not be disclosed unless confidentiality has been waived or disclosure is required under the Freedom of Information Act or other Federal law.

(c) Informal review under this section shall not affect any right to formal review under section 525 of the Act or to a citizen's suit under section 520 of the Act.

(d) Any determination made under paragraph (b) of this section shall constitute a decision of OSM within the meaning of 43 CFR 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4.

III. OSM's Motion to Dismiss

On September 16, 1986, OSM filed a motion to dismiss this appeal for lack of jurisdiction. "Appellant filed a citizen's complaint with the Secretary's authorized representative, W. Hord Tipton, Director of the Lexington Field Office * * * for [OSM]," OSM asserts. Tipton's July 1, 1986, letter was "an explanation of why no enforcement action was taken" in accordance with 30 CFR 842.12(d)(1), OSM argues. Its motion continues:

Once this decision is made by the authorized representative of the Secretary, the person who made the request under Section 842.12 may ". . . ask the Director . . . to review informally [the] authorized representative's decision not to take appropriate enforcement action." 30 CFR 842.15(a). The Director then has thirty days from the receipt of a request for informal review under 30 C.F.R. 842.15 to render a review decision, in writing, regarding his authorized representative's decision not to take enforcement action. 30 CFR 842.15(b). The decision of the Director under 30 CFR 842.15(b) "constitute[s] a decision of OSM within the meaning of 43 CFR § 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals" (30 CFR 842.15(d)). [16]

Appellant points out that 30 CFR 842.15(a) and (b) provide for information review by "the Director or his or her designee," and argues that the Director of the Kentucky Field Office is that designee and a "delegate"

16/ Motion to Dismiss Appeal at 2.

of the Director under 43 CFR 4.1281. (Emphasis in original.) Appellant argues that 30 CFR 842.15(a) requires only one level of informal review prior to invoking the Board's jurisdiction and that appellant "has properly exhausted the informal review procedures of 30 CFR 842.15." 17/

OSM replies that the argument that the "field decision" by the Director of the Lexington Field Office is a review by the Director's designee is "untenable" and that a

reading of the plain language of Section 517(h)(1) of the Act in conjunction with [30 CFR] 842.12 and 842.15 * * * clearly indicates that Mr. Tipton's decision must be appealed to the Director under 30 CFR 842.15, and that the Director or his designee at that level must rule on the field decision before Appellant's case is ripe for appeal to the Board. [18/] [Emphasis in original.]

In order to ascertain how OSM carries out its functions under these regulations, the Board, by order dated October 9, 1986, directed it to provide "an elaboration of the responsibilities of Field Offices and Area Offices outlined in 116 DM 5.1 * * * and the activities each kind of office actually performs in implementing these responsibilities." OSM responded that Area Offices

17/ Response to Motion to Dismiss at 1, 4.

18/ Appellees' Reply Brief at 2-3. Section 517(h)(1) of the Act, 30 U.S.C. § 1267(h)(1) (1982), provides:

"Any person who is or may be adversely affected by a surface mining operation may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Chapter which he has reason to believe exists at the surface mining site. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation. The Secretary shall furnish such persons requesting the review a written statement of the reasons for the Secretary's final disposition of the case."

are managed by Area Managers who are under the direct supervision and direction of the Field Office Director. Each Area Office is responsible for a specific geographic area within its Field Office's jurisdiction. The Area Office conducts field inspections of coal mines and mining activities under approved oversight policies and procedures. The Area Office processes citizen complaint's [sic] and Congressional inquiries through State regulatory authority and monitors them to conclusion or takes Federal action in the absence of the State's satisfactory resolution; provides technical assistance to the State on regulatory issues; directs field investigations of abandoned mine lands emergencies and renders determinations of eligibility for OSMRE action or makes appropriate referral to State authorities for consideration in grants. The Area Office [sic] also directs inspections and/or investigations for special studies into problem areas as defined by OSMRE and/or the Field Office Director. [19]

Field offices are the next level of OSM and are responsible for one or more states (and, in the West, certain Indian tribes). OSM states that

[e]ach Field Office is headed by a Director who reports to the Assistant Director, Eastern Field Operations. The Director is responsible for administering OSMRE activities for the specific geographic areas under his area's supervision. The Field Offices administer the OSMRE reclamation and enforcement program established by the Surface Mining Act and as promulgated in State and Federal regulation. The Field Office reviews and monitors State permanent regulatory, abandoned mine land, and grant programs; recommends and approves grant actions, recommends to the assistant Director the formulation and/or changes to policy and other OSMRE matters. The Field Offices also investigate abandoned mine lands emergency projects and recommend corrective action to the appropriate technical center or State regulatory authority. The Field Office monitors and directs the Area Offices in the performance of their duties; interacts with the Department's solicitor's [sic]; assures assistance to the State for all reclamation and enforcement issues as may be required; and develops annual evaluation reports of the States' performance under the permanent program for Congress. [20/]

19/ Appellees' Reply Brief at 5-6.

20/ Id. at 4-5.

As indicated, field office directors report to an Assistant Director for Field Operations, who is "responsible for the day-to-day management and policy direction of the * * * Field Offices * * * [and] provides overall programmatic, technical, and administrative support to" those offices. 21/

The Assistant Directors for Field Operations report in turn to the Deputy Director, Operations and Technical Services, who, among other responsibilities, "provides policy, procedures and guidance for * * * inspection and enforcement programs," and who is also responsible "through [the] Assistant Director * * * for overall management of * * * Field Offices." 22/

At the head of OSM is the Director, who, "as chief executive for the Office, provides the leadership and direction of OSMRE activities * * * [and] formulates OSMRE policy within limits delegated by the Secretary." 23/

A survey of the Board's opinions and pending appeals from informal review of decisions by OSM in response to requests for inspection indicates that OSM practice under the regulations varies. Sometimes, as in this case, the informal review is conducted by a field office (see Fred D. Zerfoss, 81 IBLA 14 (1984); Tommy Carpenter, 88 IBLA 286, 92 I.D. 383 (1985)), sometimes by the Director (see Dennis Zaccagnini, 96 IBLA 97 (1987), Samuel M. Mullinax, 92 IBLA 52 (1987); Donald St. Clair, supra)),

21/ 116 DM 4.3.

22/ 116 DM 4.1.

23/ 116 DM 2.2.

and sometimes by an Assistant Director for Field Operations (see Paul Beers, IBLA 87-283). 24/

In this case it is apparent that neither OSM nor appellant complied fully with the procedures set forth in 30 CFR 842.12 and 842.15. The record does not contain appellant's "signed, written statement [following her oral report] giving the authorized representative reason to believe that a violation, condition or practice referred to in § 842.11(b)(1)(i) exists and that the State regulatory authority, if any, has been notified, in writing, of the existence of violation, condition or practice," as required by 30 CFR 842.12(a). The London Area Office to which the request for inspection was made did not send appellant "a description of the enforcement action taken * * * or an explanation of why no enforcement action was taken" within 10 days of its January 9 inspection -- or within 10 days of the response to its 10-day notice which it received on February 15 from the Kentucky DSMRE -- or an explanation of appellant's right to informal review under 842.15, as required by 30 CFR 842.12(d). Nor, contrary to its assertion that its May 28, 1986, "letter clearly constituted a request for informal review," did appellant ask the Director or his designee to review informally the inaction of the London Area Office or include a "statement of how the person is or may be adversely affected and why the decision merits review," as required by 842.15(a). 25/ Nor, finally, did the July 1, 1986, letter from

24/ The Assistant Director's Jan. 26, 1987, decision in Paul Beers begins: "Jed Christensen, Director of the Office of Surface Mining Reclamation and Enforcement (OSMRE) has asked me to respond to your January 13, 1987, request for an informal review of an alleged failure to conduct a Federal inspection."

25/ Response to Motion to Dismiss at 3. As for adverse effect, OSM's May 23, 1985, report refers to meeting "Ms. Hazel King at her home near the

the Director of the Kentucky Field Office to appellant's counsel contain a right of appeal to the Office of Hearings and Appeals, as required by 842.15(d).

[1] Nevertheless, we do not believe OSM's motion to dismiss is warranted, either for these defects 26/ or for the reasons OSM offers in support of it. The Congress intended section 517(h), 30 U.S.C. § 1267(h) (1982), "to provide a speedy, efficient means for citizens who are or may be affected by a surface mining operation to obtain review of a failure to issue a notice or order or to conduct an adequate and complete inspection." 27/ "This provision could be very useful in avoiding litigation," it observed. 28/ As noted in Donald St. Clair, supra, the Department's actions indicate an intent that all decisions on citizens' complaints be reviewable. When the regulations were revised in 1982, no change was made to restrict the definition of Director in 30 CFR 700.5, nor was any limitation on who could be his or her designee under 30 CFR 842.15 suggested in the preamble to either the proposed or final revisions of the regulation.

The language of the regulations authorizes "an authorized representative of the Secretary" of "the Office" to respond in accordance with

fn. 25 (continued)

site [of the crack]" and states that the mining stops "just short of the houses in the bottom of the valley adjacent to the King property."

26/ The failure to specify a right to appeal in an informal review decision does not deprive the Board of jurisdiction. Donald St. Clair, supra at 294, 90 I.D. at 501-02. Appellant's May 28, 1986, letter did make clear why it believed action by OSM was required. In the absence of any decision in accordance with 842.12(d), such a statement is sufficient.

27/ S. Rep. No. 128, 95th Cong., 1st Sess. 86 (1977).

28/ Id.

30 CFR 842.12 to a citizen's request for an inspection, without specifying any level of OSM. The language also authorizes either "the Director or his or her designee" to "review informally an authorized representative's decision not to inspect or take appropriate enforcement action" and to "conduct the review and inform the person, in writing, of the results of the review" in accordance with 30 CFR 842.15(a) and (b), again without specifying any level for either the "authorized representative" or the "designee." In sum, the regulations authorize decisions by any authorized representative and informal review by the Director or any designee.

Considering the history and language of the regulations and the organization and functions of OSM, we do not believe informal review under 842.15 must be conducted by "the Director or his designee at that level," as OSM suggests. Indeed, given the structure of OSM, it is unclear who a "designee at that level" could be. One instance of informal review is adequate before an appeal to the Board under 43 CFR 4.1281 for the "Secretary's final disposition," as provided in 30 U.S.C. § 1267(h)(1) (1982). Who may conduct that informal review depends -- as it does under OSM's current practice under the regulations -- on what authorized representative makes the decision under 842.12 and whether the Director has specifically designated anyone to conduct it. In the absence of a specific designation, it may be conducted by any "neutral person" who is not "an immediate supervisor of the inspector whose actions are being reviewed." ^{29/} We see no need for it to be OSM's chief executive or other policy-making person. OSM's motion to dismiss is therefore denied.

^{29/} Id.

IV. Relief

[2] As of October 22, 1986, OSM reported that the "extremely large size of these cracks and their proximity to a hillside trail render them an extreme danger to the health and safety of the general public." The interim report of the October 16, 1986, investigation stated "[t]hese cracks average 4 to 6 feet in width and the * * * deepest portion of the crack was estimated * * * to be in excess of 200 feet." This description and the recommendations that the cracks be fenced and that a reclamation plan to abate the hazard by filling the cracks and restoring the hillside to a safe condition be prepared immediately and implemented immediately upon approval by the state regulatory authority contradict the reasons offered by the Commissioner of the Kentucky DSMRE in his September 10, 1986, letter for not requiring enforcement action.

Based on the record before us, we find that Kentucky has failed to take appropriate action in response to the January 10, 1985, 10-day notice from OSM or to show good cause for such failure. Therefore, this case is remanded to OSM for an immediate reinspection. 30 U.S.C. § 1271(a)(1); 30 CFR 843.12(a)(2). If OSM determines that there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall immediately issue a notice of violation or cessation order, as appropriate. 30 CFR 843.12(a); see Peabody Coal Co. v. OSM, 95 IBLA 204, 210-11, 94 I.D. (1987); Bannock Coal Co. v. OSM, 93 IBLA 225, 234-35 (1986); Turner Brothers, Inc. v. OSM, 92 IBLA 320, 325 (1986).

If it determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, OSM shall immediately order a cessation of operations or the portion thereof relevant to the condition. 30 U.S.C. § 1271(a)(2) (1982); 30 CFR 843.11(a)(1); Mid-Mountain Mining, Inc. v. OSM, 92 IBLA 4, 6 (1986). A condition or violation is an imminent danger to the health or safety of the public if it creates the possibility of substantial injury that a rational person, cognizant of the danger involved, would choose to avoid. 30 U.S.C. § 1291(8) (1982); Carbon Fuel Co., 3 IBSMA 207, 212, 88 I.D. 660, 662 (1981). If OSM finds that the ordered cessation will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm. 30 U.S.C. § 1271(a)(2) (1982); 30 CFR 843.11(a)(3).

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, OSM's motion to dismiss is denied; the July 1, 1986, decision of the Kentucky Field Office is vacated; and the matter is remanded to OSM for action consistent with the instructions above.

Will A. Irwin
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge.

